

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 76666 of 2016

WITH

Customs Cross Objection No. 30 of 2016

(Arising out of Order-in-Original No. 12/COMMR/CUS/SLG/16-17 dated 13.07.2016 passed by the Commissioner of Customs, Central Excise and Service Tax, Siliguri, C.R. Building, Haren Mukherjee Road, Hakim Para, Siliguri – 734 001)

Shri Birendra Kumar Gupta

: Appellant

S/o. Shri Ramprit Sah,
Hanuman Mandir Road, P.O. & P.S. – Jaigaon,
District: Alipurduar (W.B.), PIN – 736 182

VERSUS

Commissioner of Cus., C.Ex. and Service Tax

: Respondent

C.R. Building, Haren Mukherjee Road, Hakim Para,
Siliguri – 734 001

AND

Customs Appeal No. 76713 of 2016

WITH

Customs Cross Objection No. 31 of 2016

(Arising out of Order-in-Original No. 12/COMMR/CUS/SLG/16-17 dated 13.07.2016 passed by the Commissioner of Customs, Central Excise and Service Tax, Siliguri, C.R. Building, Haren Mukherjee Road, Hakim Para, Siliguri – 734 001)

Shri Bharat Sonar

: Appellant

S/o. Late Jaleswar Sonar,
Buddha Mandir, Gital Para [Opposite to ISKCON Mandir Road,
Haiderpara], Ward No. XL of Siliguri Municipal Corporation,
P.O.: Haiderpara, P.S.: Bhaktinagar,
Dist: Jalpaiguri (W.B.), PIN – 734 006

VERSUS

Commissioner of Cus., C.Ex. and Service Tax

: Respondent

C.R. Building, Haren Mukherjee Road, Hakim Para,
Siliguri – 734 001

APPEARANCE:

Shri Arijit Chakrabarti, Advocate for the Appellants
Assisted by Shri Prabir Bera, Advocate

Shri Faiz Ahmed, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOS. 76166-76167 / 2024

DATE OF HEARING: 20.05.2024

DATE OF DECISION: 27.06.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

Both these appeals have been filed against the Order-in-Original No. 12/COMMR/CUS/SLG/16-17 dated 13.07.2016 wherein penalty of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) each has been imposed on the appellants under Section 112(a) and 112(b) of the Customs Act, 1962.

2. Brief facts of the case are that on the basis of intelligence gathered, the Officers of the Directorate of Revenue Intelligence (DRI) intercepted Shri Bharat Sonar (hereinafter referred to as "appellant no. 2") while alighting from an Alipurduar-Siliguri bound bus on 16.08.2015. Upon search of the body of the appellant no. 2, nine yellow metal bars, believed to be of gold, wrapped in newspapers, were recovered from him.

2.1. On enquiry, the appellant no. 2 informed that he had procured the said gold from one person by name Shri Birendra Gupta (hereinafter referred to as "appellant no. 1") of Jaigaon.

2.2. The Officers believed that the said gold bars were of foreign origin smuggled into India without payment of Customs duties. As the appellant no. 2 was not in possession of any licit documents for legal importation, possession, transportation and carrying the nine pieces of yellow metal bars believed to be gold of foreign origin, the said goods were seized by

the Officers under Section 110 of the Customs Act, 1962.

3. After investigation, a Show Cause Notice dated 11.02.2006 was issued to both the appellants wherein it was *inter alia* proposed to confiscate the nine gold bars totally weighing 9,000 grams, valued at Rs.2,37,75,300/-, under Section 111(b) and 111(d) of the Customs Act, 1962. Penalty was also proposed to be imposed on both the appellants under Section 112(a) and 112(b) of the Act.

4. On adjudication, the Ld. Commissioner vide the impugned order absolutely confiscated the nine gold bars and imposed penalty of Rs.25,00,000/- each on both the appellants in terms of Section 112(a) and Section 112(b) of the Customs Act.

5. Aggrieved against the imposition of penalties, both the appellants have filed these appeals.

6. The appellant no. 2 viz. Shri Bharat Sonar, submits that the Id. adjudicating authority has passed the impugned order dated 13.07.2016 and imposed penalty against him only on the basis of the Statement dated 16.08.2015 given by him and the Statement dated 13.01.2016 of Shri Birendra Kumar Gupta (appellant no. 1). He submits that the Statement dated 16.08.2015 was not voluntary; the said statement was typed in English and he was asked to sign when he was in detention. He denied that the gold was recovered from his possession. He further submits that no opportunity was given to cross-examine the Pancha witnesses and hence the adverse conclusion arrived at by the Id. adjudicating authority on the basis of the said statements is not sustainable.

6.1. He further submits that the provisions of Section 138B Of the Customs Act, 1962 have not been complied with by the Id. adjudicating authority and thus no cognizance can be taken of the statements recorded during the course of investigation which have been relied upon by the Id. adjudicating authority. In this regard, he relied upon the following decisions: -

(i) Sampad Narayan Mukherjee v. Union of India [2019 (366) E.L.T. 280 (Cal.)]

(ii) Commissioner of Cus., Airport & Admn., Kolkata v. Himadri Chakraborty [2023 (386) E.L.T. 418 (Cal.)]

(iii) Ajay Saraogi v. Union of India [2023 (386) E.L.T. 333 (Cal.)]

6.2. In view of the above, the appellant no. 2 submits that the penalty imposed on him is not sustainable and prayed for setting aside the same.

7. The appellant no. 1, Shri Birendra Kumar Gupta, submits that he has nothing to do with the nine kilograms of gold seized from appellant no. 2 on 16.08.2015. It is his contention that the appellant no. 2 had implicated him in his Statement dated 16.08.2015 without any basis; the Department has failed to verify the veracity of the said statement and issued summons to him (appellant no. 1) only on 17.12.2015, which is after four months. It is also his submission that on 13.01.2016, he was interrogated in connection with the seizure in another case and falsely implicated in the present case on the basis of the statement dated 13.01.2016 recorded from him; the statement was computer-typed in Hindi at the instance of the DRI officers; he was not aware of the contents of it.

7.1. It is also submitted that the provisions of Section 138B have not been complied with for taking cognizance of the said statements; since the provisions of Section 138B were not complied with in the instant case, he submits that the statements dated 16.08.2015 recorded from appellant no.2 and statement dated 13.01.2016 recorded from him cannot be relied upon to impose penalty on him. In this regard, he placed his reliance on the decisions referred at paragraph 6.1 *supra* and contended that the penalty imposed on him is not sustainable. Accordingly, he prayed for setting aside the penalty imposed on him.

8. The Ld. Authorized Representative appearing for the Revenue submits that the gold was recovered from the possession of the appellant no. 2; he was not having any valid document for carrying the gold at the time of his interception on 16.08.2015; he has categorically stated that the gold had been given to him by the appellant no. 1. Accordingly, the Ld. Departmental Representative contends that the involvement of both the appellants in the alleged offence stands established. In view of the above, he supported the imposition of penalties against the appellants by the Id. adjudicating authority in the impugned order. Revenue also filed cross objection highlighting the above points.

9. Heard both sides and perused the appeal documents.

10. We find that the appellant no. 2 namely, Shri Bharat Sonar was intercepted by the Officers of the DRI on 16.08.2015. The allegation of the department is that on search of the body of appellant

no.2, 9 kgs. of gold were recovered. However, the recovery of gold from his body was refuted by the appellant no.2 in his reply dated 11.02.2016 to the Show Cause Notice. He submitted that on 16.08.2015, no gold was recovered from his possession and he never gave any statement as alleged by the Department; that he was forced to sign some blank papers by the DRI Officers and has not made any statement that Shri Birendra Kumar Gupta had handed over the gold to him; to establish that no gold was recovered from his possession, he sought the cross-examination of the Pancha witnesses, but the Department has denied the opportunity of cross-examination and passed the order implicating him. He further submits that the provisions of Section 138 of Customs Act have not been followed in this case and hence the statements recorded in this case cannot be relied upon to impose penalty on him.

10.1. We find that the Department has alleged that the gold bars of foreign origin, alleged to be smuggled in nature, were seized from the possession of the appellant no. 2 viz. Shri Bharat Sonar. It was also alleged that the said gold was handed over to him by appellant no. 1 viz. Shri Birendra Kumar Gupta, who has smuggled them into the country without payment of customs duty from China. Accordingly, it was contended that the appellant no. 2 was liable to discharge his obligation under Section 123 of the Customs Act and prove that the said gold was not smuggled in nature. We observe that as per Section 123 of the Customs Act, 1962, the burden of proving that gold is not smuggled in nature lies on the person who claims ownership of the said gold. In the present case, the appellant no. 2 has not claimed ownership

of the gold; the appellant has in fact contended that no gold was recovered from his possession. To substantiate his claim, the appellant no.2 has asked for cross examination of the Pancha witnesses. We observe that the Department ought to have allowed cross-examination of the Pancha witnesses without which it cannot be established whether there is any truth in the claim made by the appellant no. 2.

10.2. The appellant no. 2 has also claimed that he had not made any statement regarding handing over of the gold to him by Shri Birendra Kumar Gupta. The statement given by him was not voluntary. Further, the provisions of Section 138B of the Customs Act have not been followed by the Id. adjudicating authority and hence the statements cannot be relied upon to implicate him in the offence and impose penalty on him.

10.3. We observe that the provisions of Section 138B have not been followed by the Id. adjudicating authority while passing the impugned order. The Department has relied only on the statement recorded from him to conclude that the gold was recovered from his possession. As there is no other evidence available on record other than the statements recorded from both the appellants, we hold that the seizure of the gold bars from the possession of the appellant no. 2 has not been conclusively established.

10.3.1. In the case of *Commissioner of Cus., Airport & Admn., Kolkata v. Himadri Chakraborty* [2023 (386) E.L.T. 418 (Cal.)], the Hon'ble Calcutta High Court has held that if an opportunity of cross-examination of persons from whom statements are recorded is refused by an adjudicating authority,

then such statements cannot be relied upon by the adjudicating authority. The relevant paragraphs of the said decision are reproduced below: -

"6. The short question would be as to whether the adjudicating authority was right in refusing to grant an opportunity of cross-examination of third parties from whom statements have been recorded which have been referred to and relied upon in the adjudication order which was impugned in the writ petition as well as before the Learned Tribunal. The adjudicating authority in the first paragraph of the order of adjudication dated 6th September, 2018 has opined that evidence in adjudication proceedings need not be like the one in the criminal case and finding in adjudication is based on preponderance of probabilities. Further, the adjudicating authority observed that in the cases on hand there are enough circumstantial evidences which provide for reliable basis for corroboration of the statement given under Section 108 of the Act. Furthermore, it has been observed that the witnesses who have given statements voluntarily have not retracted their statements and the witnesses are well conversant with the facts of the case and the role of the noticees/respondents. Therefore, the adjudicating authority rejected the prayer for cross-examination on the ground that it is flimsy. The adjudicating authority relied upon a judgment of the Hon'ble Supreme Court in *Kanugo & Co. v. Collector of Customs, Calcutta & Ors.*, reported in [1983 \(13\) E.L.T. 1486](#) (S.C.). As pointed out earlier, the question would be that if third party statements are to be relied upon with or without corroborative evidence, is the noticee entitled to cross-examine the said third party? As pointed out earlier, elaborate submissions have been made and voluminous compilation of judgments have been placed by the Learned Standing Counsel for the Revenue as well as the Learned Counsel for the respondent. In our considered view, the necessity to answer the question of law arises for consideration in these appeals may not arise on account of the peculiar facts and circumstances of the case. Admittedly, as per the view taken by the adjudicating authority as is evident from the order of adjudication that there are sufficient evidence available to justify the imposition of penalty on the noticees. It is true that the adjudicating authority has stated that this defence which is available corroborates the statement given by the third parties under Section 108 of the Act. Thus, if according to the adjudicating authority, there is enough evidence to pin down the respondent de hors the statements recorded under Section 108 of the Act, this Court fails to understand as to why the adjudicating authority should place reliance upon the statement under Section 108 of the Act. The Learned Counsel for the

respondent in MAT/556/2019 submitted that in several of the decisions relied upon by the Revenue there were cases where statements were retracted and certain other cases where there was direct link between the persons who had given the statements who were also noticees as well as the other co-noticees and the case on hand is entirely different as the noticees who are respondents in these appeals are independent persons. In our view, considering various factors more particularly the peculiar facts and circumstances of the case and also taking note of the fact that the adjudication proceedings commenced with the issuance of the show cause notice in the year 2018, and the matter has been lingering before this Court as well as before the Tribunal for several years. We are of the view that without answering the substantial questions of law which have been raised by the Revenue in these appeals, a workable direction can be issued whereby the questions of law can be left open at the same time, the rights of the respondents/noticees are protected as well as the interest of the Revenue also can be protected. In that view of the matter, the appeals stand disposed of with the following order and directions.

7. The respondents are directed to treat the order of adjudication dated 6th September, 2018 as a show cause notice and the respondents are directed to submit their additional reply clearly pointing out that the statements recorded under Section 108 of the Act cannot be relied upon to frame the noticees and the respondents shall submit their additional reply on the alleged evidence which is stated to be available with the Department as mentioned in the order of adjudication. The respondents are directed to submit their reply within a period of six weeks from the date of receipt of the server copy of this order. On receipt of the reply, the adjudicating authority is directed to afford an opportunity of personal hearing to the authorised representative of the respondent and adjudicate the case afresh."

10.3.2. Further, in the case of *Sampad Narayan Mukherjee v. Union of India* [2019 (366) E.L.T. 280 (Cal.)], the Hon'ble High Court has held that adjudication proceedings conducted by the adjudicating authority without allowing cross-examination of the persons making the statements is vitiated by breach of the principles of natural justice. The relevant portion of the said decision reads as under: -

"27. The Act of 1962 empowers the Customs authorities to make an enquiry, initiate adjudication proceedings and file prosecution. The Act of 1962 allows an appeal against an order-in-original passed in the adjudication proceeding. There [are] provisions for revision also. When making an enquiry, an officer of the Customs may require attendance of a person to make a statement. He is empowered to require a person to make a statement under Section 108 of the Act of 1962. Such a statement made in the course of an enquiry, and if its limited to the enquiry, then, the question of the person making the statement being open to cross-examination does not arise. However, once an adjudication proceeding is initiated, and a statement made under Section 108 of the Act of 1962 is introduced as a piece of evidence in such adjudication proceedings, then, the person making that statement must be made available for cross-examination to the party against whom such statement has been used in the adjudication proceedings, subject to the provisions of Section 138B of the Act of 1962. If the conditions prescribed under Section 138B(1) of the Act of 1962 is satisfied, then, the statement made by a person under Section 108 of the Act of 1962 would become relevant in the adjudication proceedings, notwithstanding, such a person not being cross-examined by the person who is affected by such a statement.

28. In the facts of the present case, the order-in-original records that, the petitioner was disallowed cross-examination of any person making any statement against the petitioner under Section 108 of the Act of 1962. The order-in-original relies upon such statements as evidence. The impugned order-in-original does not record a finding that, any of the conditions specified under Sections 138B(1) of the Act of 1962 stands satisfied thereby making such statements relevant without cross-examination of such witness by the petitioner.

29. In such circumstances, the adjudication proceedings conducted by the adjudicating authority and resultant the impugned order-in-original stand vitiated by breach of principles of natural justice. The impugned order-in-original is quashed."

10.3.3. From the decisions cited above, we observe that an adjudicating authority should allow cross-examination of the person(s) making the statements before relying on such statements against the appellants. In the present case, we find that the Id. adjudicating authority has denied the opportunity of cross-examination of the Pancha witnesses sought

by the appellant. When the appellant no. 2 questions the seizure of the gold from his possession, it is all the more necessary to allow cross-examination of the Pancha witnesses who are the persons said to have witnessed the seizure of the gold from the appellant. By not allowing the cross-examination, the Department could not conclusively establish that the nine gold bars were seized from the appellant. There is no evidence available on record to dispute the claim made by the appellant. In view of the above, we hold that the benefit of doubt should be given to the appellant no. 2.

10.4. Regarding the penalty imposed on the appellant no. 2, we observe that the appellant no. 2 has not claimed ownership of the gold. Penalty under section 112(a) and 112(b) can be imposed only when the active involvement of the appellant is established in the smuggling of gold. For better appreciation, the said Section is reproduced below: -

"SECTION 112. Penalty for improper importation of goods, etc. — Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable, -

...."

10.5. In the present case, the evidence available on record does not establish that appellant no.2 was actively involved in the smuggling of the gold. Accordingly, we hold that the penalty imposed on the

appellant no. 2 under Section 112(a) and 112(b) of the Act is not sustainable in the facts and circumstances of this case.

11. Regarding the penalty imposed on the appellant no. 1 viz. Shri Birendra Kumar Gupta, we observe that the appellant no. 2 implicated him in his Statement dated 16.08.2015, as the person who handed over the gold to him. However, there is no corroborating evidence available on record to substantiate this allegation. Later, after four months, Shri Birendra Kumar Gupta was arrested in another case. While recording his Statement dated 13.01.2016 in that case, he admitted that he has earlier sold the said 9 kgs gold to Shri Bharat Sonar. However, we find that in his reply dated 11.02.2016 to the Show Cause Notice, the appellant no. 1 denied to have given any such statement implicating Shri Bharat Sonar. In his reply dated 13.01.2016, appellant no.1 stated that he has not given any confessional statement to DRI authorities and has not sold any yellow metal bars / gold of foreign origin to Shri Bharat Sonar. Thus, we find that appellant no. 1 has retracted his statement by means of the reply to the Show Cause Notice.

11.1. We also observe that the provisions of Section 138B of the Customs Act have not been followed by the Id. adjudicating authority before taking cognizance of the statement given by appellant no.1. Since the provisions of Section 138B have not been followed, the statements recorded from appellant no.1 and 2 cannot be relied upon to implicate them in the offence. Accordingly, by relying on the decisions cited in paragraphs 10.3.1 and 10.3.2 of this Order, we hold that the penalty imposed on the appellant no. 1 is not sustainable.

11.2. We observe that there is no other evidence other than the statements recorded from both the appellants available on record to establish that the gold bars in question have been handed over to appellant no.2 Shri Bharat Sonar by appellant no.1 Shri Birendra Kumar Gupta. We also observe that as per Section 123 of the Customs Act, 1962, the burden of proving that gold is not smuggled in nature lies on the person who claims ownership of the said gold. In the present case, both the appellants have not claimed ownership of the gold and hence the provisions of sections 123 of Customs Act, 1962 are not applicable to them. Accordingly, we find that the ingredients available in Section 112(a) and 112(b) of the Customs Act, 1962 are not existing in this case to impose penalty on both the appellants. Accordingly, we hold that the penalty imposed on both the appellants under Section 112(a) and (b) of the Customs Act, 1962 is not sustainable and hence we set aside the same.

12. In view of the above discussions, we set aside the penalties imposed on the appellant no. 1 and appellant no. 2 and allow the appeals filed by them. The cross objections filed by the Revenue are also disposed of accordingly.

(Order pronounced in the open court on **27.06.2024**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd